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# Fundamentals of Summary Jurisdiction in Straight Bankruptcy over Controversies between Trustees and Third Persons

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# FUNDAMENTALS OF SUMMARY JURISDICTION IN STRAIGHT BANKRUPTCY OVER CONTROVERSIES BETWEEN TRUSTEES AND THIRD PERSONS

*Jerrold L. Strasheim\**

## I. INTRODUCTION

It is open to the Congress under its constitutional authority<sup>1</sup> to create separate bankruptcy courts.<sup>2</sup> Instead of doing so, Congress has directed United States district courts to serve as bankruptcy courts on a part time basis.<sup>3</sup>

It also is within the congressional prerogative to confer upon the chosen bankruptcy courts exclusive jurisdiction over all controversies arising under the Bankruptcy Act.<sup>4</sup> But that jurisdiction has been fractionated with some reserved to bankruptcy courts and the balance distributed to two kinds of nonbankruptcy courts, namely United States district courts sitting as ordinary federal courts and state courts.<sup>5</sup>

Jurisdiction may be classified as either plenary or summary. Summary jurisdiction is the power to adjudicate controversies in summary proceedings.<sup>6</sup> Plenary jurisdiction is comparable judicial power to adjudicate in plenary proceedings,<sup>7</sup> i.e., an ordinary suit at law or in equity in which the trustee or receiver in bankruptcy happens to be a party.

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<sup>1</sup> U.S. CONST. art. I, § 8, cl. 4: "The Congress shall have the power . . . to establish . . . uniform laws on the subject of bankruptcies throughout the United States."

<sup>2</sup> Bondurant, *The Bankruptcy Court as a Constitutional Court*, 45 AM. BANKR. L. J. 235, 236 (1971).

<sup>3</sup> 1 J. MOORE, FEDERAL PRACTICE § 0.60(8-6), at 651 (3d ed. 1966); Bankruptcy Act § 1(10), 11 U.S.C. § 1(10) (1970).

<sup>4</sup> Mussman & Riesenfeld, *Jurisdiction in Bankruptcy*, 13 LAW & CONTEMP. PROB. 88, 89 (1948); Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426 (1924).

<sup>5</sup> D. COWANS, BANKRUPTCY LAW AND PRACTICE § 834 (1963).

<sup>6</sup> 5 J. MOORE, FEDERAL PRACTICE § 38.30(3) (3d ed. 1966).

<sup>7</sup> *Id.* at § 38.30(4).

Bankruptcy courts exercise plenary jurisdiction in a few instances, but practically all of their cases involve summary jurisdiction.<sup>8</sup> Nonbankruptcy courts exercise plenary jurisdiction.

This article deals with the bankruptcy court's summary jurisdiction in straight bankruptcy over controversies between receivers or trustees, hereinafter called simply trustees, and third persons. It does not deal with summary jurisdiction in reorganizations, arrangements or other rehabilitative proceedings under the Bankruptcy Act.<sup>9</sup> It also does not deal with summary jurisdiction over other kinds of controversies in straight bankruptcy, most notably those between the bankrupt and his creditors concerning his general discharge or the dischargeability of his particular debts.<sup>10</sup>

As a coalescence of procedure and jurisdiction, summary jurisdiction has several perplexing aspects, the more significant of which hopefully are identified and simplified below.

## II. SUMMARY PROCEEDINGS

Whether jurisdiction is summary or plenary determines the "mode of procedure for trying out" the controversy.<sup>11</sup> Summary proceedings, those employed in the internal workings of the bankruptcy courts, constitute one of the two alternatives; plenary proceedings, or in other words those used in separate civil suits, constitute the other.

The Bankruptcy Act and General Orders contain but few rules of procedure with general applicability for all summary proceedings. Instead, they offer a few rules for parts of selected summary

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<sup>8</sup> The Bankruptcy Act, §§ 23b, 60b, 67e, and 70e(3), 11 U.S.C. §§ 46b, 96b, 107e, and 110e (1970), read literally, provides that plenary suits to recover preferences and fraudulently conveyed property are heard by the bankruptcy court, although some argue the language is a legislative oversight and those cases are heard by the district court as an ordinary federal court, or in other words, by a nonbankruptcy court. Involuntary bankruptcies amount to plenary suits or at least are difficult to classify as summary proceedings. *See also Williams v. Austrian*, 331 U.S. 642 (1947) [bankruptcy court (reorganization) hearing a plenary suit].

<sup>9</sup> The principles of summary jurisdiction in straight bankruptcy are enlarged upon to an uncertain extent by considerations of title in reorganizations, arrangements, and the like by reason of express statutory provisions conferring exclusive jurisdiction over the debtor and his property wherever located, Bankruptcy Act §§ 77(a), 111, 311, 411, 611, 11 U.S.C. §§ 205(a), 511, 711, 811, 1011 (1970).

<sup>10</sup> *Id.* §§ 2a(12), 14, 17, 38(4), 11 U.S.C. §§ 11a(11), 32, 35, 66(4) (1970).

<sup>11</sup> *Katchen v. Landy*, 382 U.S. 323, 326 (1966).

proceedings<sup>12</sup> and sanction queasy, on-again off-again application of some of the Federal Rules of Civil Procedure for the balance.<sup>13</sup> In some jurisdictions local rules of court may regulate phases of procedure in summary proceedings.

But in the main, summary proceedings have always been more a matter of practice than a set of legislated or promulgated rules. Their hallmark is flexibility; they are designed to promote dispatch and economy by shaping rules on an ad hoc basis within the pattern of procedures for plenary proceedings, but avoiding the excessive, drawn-out proceduralisms sometimes incident to plenary proceedings.

Summary proceeding like plenary proceedings must meet constitutional requirements of procedural due process.<sup>14</sup> This means that overall they must be fair and regular "according to . . . rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights . . ."<sup>15</sup> and that litigants are entitled to receive due notice of the proceeding and the subject thereof and to be accorded a reasonable opportunity to be heard.<sup>16</sup>

A jury is not available in summary proceedings,<sup>17</sup> and the referee invariably presides, although a district judge may do so.<sup>18</sup>

Aside from the absence of a jury and the presence of the referee, the differences between summary proceedings and nonjury plenary proceedings all arise before trial. In other words, it is in the issue-framing and original process stages that summary proceedings are liberated from the many hard and fast nonconstitutional rules that govern plenary proceedings.

In current practice, summary proceedings are instituted by application or motion rather than by complaint or petition as are plenary proceedings; the original process is an order to show cause

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<sup>12</sup> *E.g.*, Bankruptcy Act §§ 14, 58b, 11 U.S.C. §§ 32, 94b (1970).

<sup>13</sup> *Id.* § 21k, 11 U.S.C. § 44k (1970).

<sup>14</sup> *In re Wood & Henderson*, 210 U.S. 246 (1908); *Bradley v. St. Louis Terminal Warehouse Co.*, 189 F.2d 818 (8th Cir. 1951).

<sup>15</sup> *Endicott-Johnson Corp. v. Encyclopedia Press*, 266 U.S. 285 (1924).

<sup>16</sup> *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950).

<sup>17</sup> *Katchen v. Landy*, 382 U.S. 323 (1966); *In re Christensen*, 101 F. 243 (D.C. Iowa 1900); 5 J. MOORE, *FEDERAL PRACTICE* § 38.30(2) (3d ed. 1966).

<sup>18</sup> Bankruptcy Act § 1(9), 11 U.S.C. § 1(9) (1970), defines the term "court" to mean either the referee or the judge. In practice the former hears all straight bankruptcy cases.

or a notice of motion served less formally than a summons issued by either federal or state courts; responsive pleadings are required to be filed only when the court directs instead of automatically within fixed times as in plenary proceedings; and since the time of trial is fixed at the outset in the order to show cause, discovery and pretrial proceedings are less regularly employed than in plenary proceedings.<sup>19</sup> Usually, in summary proceedings the trial is sooner than in plenary proceedings, sometimes within a few days, the requirement being only that there be reasonable time for preparation.<sup>20</sup>

Once the trial begins there is no difference between summary proceedings and plenary proceedings. The same rules of evidence apply in trials in summary proceedings as apply in trials in plenary proceedings in the federal courts:<sup>21</sup> proposed *Rules of Evidence for the United States Courts and Magistrates* may soon be applicable.<sup>22</sup> The trial in summary proceedings is not akin to a hearing in a plenary suit leading to a summary judgment, and the two should not be confused. Controversies are not decided *ex parte*, and affidavits are no more admissible in evidence than they are in plenary proceedings, although some courts who should know better keep suggesting that this is so.<sup>23</sup>

In the future, what is now current practice is likely to be changed as a result of the *Preliminary Draft of Proposed Bankruptcy Rules*. Under these rules, summary proceedings dealing with almost all the controversies between the trustees and third persons covered in this paper are classified as adversary proceedings,<sup>24</sup> and they are regulated by rules which, at least in theory, combine the best in both

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<sup>19</sup> 5 J. MOORE, *FEDERAL PRACTICE* § 38.30(3) (3d ed. 1966); see also Herzog, *Bankruptcy Law—Modern Trends*, 40 REF. J. 19 (1966).

<sup>20</sup> 5 J. MOORE, *FEDERAL PRACTICE* § 38.30(3) (3d ed. 1966).

<sup>21</sup> *Id.* See *Builders Steel Co. v. Commissioner*, 179 F.2d 377 (8th Cir. 1950).

<sup>22</sup> PROPOSED FEDERAL RULES OF EVIDENCE (Rev. Draft 1971), in 51 F.R.D. 315 (1971), made applicable to bankruptcy proceedings by Rules 101 and 1101.

<sup>23</sup> Seligson & King, *Jurisdiction and Venue in Bankruptcy*, 36 REF. J. 73 (1962); Herzog, *supra* note 19.

<sup>24</sup> More important kinds of disputes fall into the classification of adversary proceedings which are listed in Bankruptcy Rule 701, including proceedings brought to recover money or property, determine lien rights or sell free and clear of liens. But other kinds of disputes including objection to claims, if no counterclaim is asserted, fall into the classification of "contested matters." Treister, *A Practicing Lawyer's Primer on the Proposed New Bankruptcy Rules*, 45 AM. BANKR. L. J. 343 (1971).

summary proceedings and plenary proceedings, retaining much of the flexibility of the former but incorporating many of the "traditional safeguards" which the Federal Rules of Civil Procedure bring to the latter.<sup>25</sup> Attorneys who do not specialize in bankruptcy are bound to feel more comfortable in summary proceedings under the Proposed Bankruptcy Rules than under the present rules.

The Proposed Bankruptcy Rules provide that adversary proceedings are instituted by the filing of a complaint<sup>26</sup> and for a summons as original process<sup>27</sup> although ordinarily service is by mail with return receipt.<sup>28</sup> They require responsive pleadings within twenty days or such different date indicated by the court in the summons.<sup>29</sup> They specify that a trial date also is to be included in the summons.<sup>30</sup> Specific rules also deal with amendment of pleadings,<sup>31</sup> third party practice,<sup>32</sup> pretrial procedures,<sup>33</sup> joinder of claims and parties,<sup>34</sup> interpleader,<sup>35</sup> intervention,<sup>36</sup> substitution of parties,<sup>37</sup> and other procedural aspects of summary proceedings for which there are rules in plenary proceedings.

Orders made by referees in summary proceedings become final within ten days.<sup>38</sup> Where such an order is a money judgment enforcement is by writ of execution or by other process available for enforcement of federal court money judgments in general.<sup>39</sup> Where such an order is for equitable relief enforcement generally is by resort to contempt powers.<sup>40</sup> Appeal of a referee's order is to a

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<sup>25</sup> *Id.*

<sup>26</sup> Rule 703.

<sup>27</sup> Rule 704(a).

<sup>28</sup> Rule 704(c).

<sup>29</sup> Rule 712(a).

<sup>30</sup> Rule 704(a); Form No. 26.

<sup>31</sup> Rule 715.

<sup>32</sup> Rule 714.

<sup>33</sup> Rule 716.

<sup>34</sup> Rules 718-721.

<sup>35</sup> Rule 722.

<sup>36</sup> Rule 724.

<sup>37</sup> Rule 725.

<sup>38</sup> Bankruptcy Act § 39c, 11 U.S.C. § 67c (1970).

<sup>39</sup> *Governor Clinton Co. v. Knott*, 120 F.2d 149 (2d Cir. 1941), *appeal dismissed*, 314 U.S. 701 (1941), holding Fed. R. Civ. P. 69(a) applicable to referee's order directing payment to trustee from other than an identifiable fund.

<sup>40</sup> *Maggio v. Zeitz*, 333 U.S. 56 (1947).

district judge,<sup>41</sup> and appeal from there is to a court of appeals.<sup>42</sup> The Proposed Bankruptcy Rules also deal with the enforcement of orders made by referees<sup>43</sup> and review and appeal from those orders.<sup>44</sup>

### III. SUBJECT MATTER JURISDICTION

Apart from its its procedural incidents, summary jurisdiction is subject matter jurisdiction which empowers the bankruptcy court to speak to particular classes of bankruptcy-spawned controversies. Plenary jurisdiction in contradistinction to summary jurisdiction denotes the power to speak to the remaining classes of such controversies.

The legislative standards supplied by Congress for separating the controversies which are amenable to summary jurisdiction from those to which plenary jurisdiction is necessary are found in the provisions of the Bankruptcy Act, which, to some extent, duplicate and supervene brief provisions in the Federal Judicial Code.<sup>45</sup> In many critical respects the provisions in the Bankruptcy Act amount to terms of art which mean no more and no less than the courts have said they mean.

The Act in section 2 confers summary jurisdiction over "proceedings," which, as detailed in numerous subsections, involve among other things the allowance of claims<sup>46</sup> and the collection of the estate.<sup>47</sup> It extends this summary jurisdiction to include any "controversy arising in a proceeding under this Act . . . ."<sup>48</sup> The Act in section 23<sup>49</sup> describes the subject of plenary jurisdiction as "controversies at law and in equity . . . between trustees and adverse claimants . . . ." Additional language in sections 2 and 23 deal with the manner and effect of consent summary jurisdiction. Other supplemental provisions in the Bankruptcy Act grant summary jurisdiction over specified controversies.

<sup>41</sup> Bankruptcy Act § 39c, 11 U.S.C. § 67c (1970).

<sup>42</sup> FED. R. APP. P. 4(a), 6, superseding as of July 1, 1968, Bankruptcy Act § 25, 11 U.S.C. § 48 (1970).

<sup>43</sup> Rules 769, 770.

<sup>44</sup> Rules 801-814.

<sup>45</sup> Not meaning what it says, the Code provides that: "The district courts shall have original jurisdiction, exclusive of the courts of the states, of all matters and proceedings in bankruptcy." 28 U.S.C. § 1334 (1964).

<sup>46</sup> 11 U.S.C. § 11a(2) (1970).

<sup>47</sup> *Id.* § 11a(7).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* § 46.

It follows that in litigation between trustees and third persons involving more than objections to claims, the division between summary and plenary jurisdiction depends upon the distinction between that species of controversy "arising in a proceeding" and that species of controversy "at law and in equity" save only in those few situations where the supplemental provisions in the Act may apply.

Guided by history, the courts have made this distinction depend upon a concept of possession and, consistent with the statutory language, a concept of consent. If the controversy is over property which the bankruptcy court has in its possession, it arises "in a proceeding" and summary jurisdiction exists. Absent possession, if the third person consents, summary jurisdiction also exists. Other controversies, except, of course, those dealt with in the supplemental provisions of the Act, are "at law and in equity" for which plenary is necessary. Thus, the trustee must invoke plenary jurisdiction either where the controversy is over property in the possession of the third person or where the controversy does not involve specific property at all, namely where it involves a mere chose in action such as an account or a claim for damages for breach of contract.<sup>50</sup>

#### A. POSSESSION

When the trustee proceeds in bankruptcy court against a third person the most fundamental basis for summary jurisdiction is possession. That basis exists without regard to the locus of title.

It is axiomatic that any court in possession of a fund is the repository of judicial power to hear and determine all claims to that fund. The jurisdiction of such a court is in rem or quasi in rem and the fund is *in custodia legis*.<sup>51</sup> It is on this theory that the bankruptcy court is empowered to decide those controversies between the trustee and others claiming title to, an interest in, or a lien on property in its possession.<sup>52</sup> As will be discussed, the theory sometimes obtains even though the property is gone.

Insofar as the bankruptcy court has possession of property its jurisdiction is exclusive.<sup>53</sup> Third persons may not proceed by self-help or in nonbankruptcy courts to replevin the property,<sup>54</sup> foreclose liens on it<sup>55</sup> or sell it for taxes.<sup>56</sup> This exclusive jurisdiction

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<sup>50</sup> Schumacher v. Beeler, 293 U.S. 367 (1934).

<sup>51</sup> Mussman & Riesenfeld, 13 LAW & CONTEMP. PROB. 88 (1948).

<sup>52</sup> I. MACLACHLAN, BANKRUPTCY § 109 (1956).

<sup>53</sup> Isaacs v. Hobbs Tie & Timber Co., 282 U.S. 734 (1931).

<sup>54</sup> White v. Schloerb, 178 U.S. 542 (1900).

<sup>55</sup> Isaacs v. Hobbs Tie & Timber Co., 282 U.S. 734 (1931).

<sup>56</sup> Dayton v. Stanard, 241 U.S. 588 (1916).



is not confined to property within the court's territory but reaches property anywhere in the United States.<sup>57</sup>

Reciprocity exists in the form of a rule of comity under which bankruptcy courts cannot ordinarily acquire possession of property already in the possession of a nonbankruptcy court when the petition in bankruptcy is filed.<sup>58</sup> According to the most widely accepted view, the nonbankruptcy court acquires constructive possession as soon as the prebankruptcy suit is instituted even though the debtor has not been removed from physical possession.<sup>59</sup> According to other views or in other contexts, the nonbankruptcy court may not acquire possession until the appointment of a receiver with authority to take physical control of the property<sup>60</sup> or until he has achieved physical control.<sup>61</sup>

It should be noted that even if the nonbankruptcy court acquired possession before the bankruptcy petition was filed, the bankruptcy court may enjoin proceedings in the nonbankruptcy court to maintain the status quo for a sufficient time to enable the trustee to investigate the litigant's claims to the property even though eventually the nonbankruptcy court will adjudicate those claims.<sup>62</sup>

When not barred by comity the bankruptcy courts may acquire either actual or constructive possession. The court comes into actual possession through the trustee or another of its officers reducing the property to his physical control. It acquires constructive possession through pure legal fiction whenever entitled to but not placed in actual possession. It is entitled to actual possession of all property in the bankrupt's possession at the time of the filing of the petition in bankruptcy.<sup>63</sup> It is also entitled to the actual possession of all of the bankrupt's property held by third persons who do not qualify as adverse claimants or their agents.<sup>64</sup>

<sup>57</sup> *Robertson v. Howard*, 229 U.S. 254 (1913); *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734 (1931).

<sup>58</sup> *Straton v. New*, 283 U.S. 318 (1931).

<sup>59</sup> *In re Greenlie-Halliday Co.*, 57 F.2d 173 (2d Cir. 1932).

<sup>60</sup> *Frazier v. Southern Loan & Trust Co.*, 99 F. 707 (4th Cir. 1900); 5 H. REMINGTON, *BANKRUPTCY* § 2050 (5th ed. 1950).

<sup>61</sup> *Rutledge v. Bristol*, 65 F.2d 986 (5th Cir. 1933); *In re Canyon Pipeline Co.*, 89 F. Supp. 233 (E.D. Ill. 1941).

<sup>62</sup> *In re Lustron Corp.*, 184 F.2d 789 (7th Cir. 1950), *cert. denied*, 340 U.S. 946 (1951).

<sup>63</sup> *Thompson v. Magnolia Petroleum Co.*, 399 U.S. 478 (1940).

<sup>64</sup> *May v. Henderson*, 268 U.S. 111 (1925).

The actual possession of the bankruptcy court tacked directly to that which the bankrupt had on the filing date of the petition in bankruptcy is an unimpeachable basis for summary jurisdiction to determine rights to the property. But actual possession is no basis for summary jurisdiction when acquired wrongfully from a third person. Thus, in *Bradley v. St. Louis Terminal Warehouse Co.*<sup>65</sup> it was held that actual possession did not confer summary jurisdiction to determine rights in goods stored in a field warehouse which the trustee took without the right to do so from the field warehouse storing them as of the day the petition in bankruptcy was filed.

Actual possession may be the basis for summary jurisdiction to determine rights to intangibles so long as the intangibles amount to specific property and have been reduced to some form of control comparable to physical control. In *Chicago Board of Trade v. Johnson*<sup>66</sup> the Court rejected the contention that a seat on a stock exchange was incapable of actual possession. It found possession enough for summary jurisdiction in the trustee's right to control the disposal of the seat. In *Walker Manufacturing Co. v. Bloomberg*<sup>67</sup> actual possession was the basis of summary jurisdiction to determine conflicting rights to a secret manufacturing process. That possession was predicated on the control found to exist in the form of exclusive knowledge of the process. Other authorities hold that actual possession of a chose in action may provide a basis for summary jurisdiction to determine whether the trustee or an assignee is the proper obligee depending upon control.<sup>68</sup> The trustee has the requisite control where under the terms of the assignment the assignee was not entitled to give notice or collect from the obligors,<sup>69</sup> but not where the assignee was entitled to do those things.<sup>70</sup> Of course, if the trustee prevails against the assignee, he must then resort to plenary jurisdiction to collect on the chose in action from the obligor.<sup>71</sup>

Constructive possession suffices in place of actual possession as a basis for summary jurisdiction to determine rights to the property. It has already been pointed out that constructive possession is fictional and is not based on physical control. Indeed, it is the negation of physical control. Its effect is to conform the limits of summary

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<sup>65</sup> 189 F.2d 818 (8th Cir. 1951).

<sup>66</sup> 264 U.S. 1 (1924).

<sup>67</sup> 298 F.2d 688 (1st Cir. 1962).

<sup>68</sup> *Schwartz v. Horowitz*, 131 F.2d 506 (2d Cir. 1942).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *In re Roman*, 23 F.2d 556 (2d Cir. 1928).

jurisdiction with actual possession as it should exist instead of as it does exist.

In *Taubel-Scott-Kitzmiller Co. v. Fox*<sup>72</sup> the Court said that constructive possession giving rise to summary jurisdiction:

[E]xists where the property was in the physical possession of the debtor at the time of the filing of the petition in bankruptcy, but was not delivered by him to the trustee; where the property was delivered to the trustee, but was thereafter wrongfully withdrawn from his custody; where the property is in the hands of the bankrupt's agent or bailee; where the property is held by some other person who makes no claim to it; and where the property is held by one who makes a claim, but the claim is colorable only.<sup>73</sup>

In the first two of those instances of constructive possession the key is whether the bankrupt had actual possession when the bankruptcy petition was filed. In that circumstance the rule stated most notably in *Thompson v. Magnolia Petroleum Co.*<sup>74</sup> and repeated so often elsewhere has relevance:

Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession. And the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy.<sup>75</sup>

In *re Livingston*<sup>76</sup> was a case of nondelivery. There the bankruptcy court was held to have summary jurisdiction to determine whether the trustee could invalidate the security interest in a never-to-be-seen-again automobile which had been in the bankrupt's hands when the bankruptcy petition was filed but shortly thereafter was repossessed through self-help and sold by the secured party. An example of wrongful withdrawal is *Whitney v. Wenman*.<sup>77</sup> There, a receiver took the actual possession of goods from the bankrupt who held them on the date the petition was filed but later the receiver, without authority, surrendered them to a warehouse company which sold them. It was held that summary jurisdiction existed to determine whether the trustee could invalidate warehouse receipts on the goods and that such summary jurisdiction had not been lost by the receiver's unauthorized surrender of them to the warehouse company.

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<sup>72</sup> 264 U.S. 426 (1924).

<sup>73</sup> *Id.* at 432-33.

<sup>74</sup> 309 U.S. 478 (1940).

<sup>75</sup> *Id.* at 481.

<sup>76</sup> 93 F. Supp. 173 (N.D. Cal. 1950).

<sup>77</sup> 198 U.S. 539 (1905).

The first two of the remaining three instances of constructive possession enumerated in *Taubel* are particular kinds of the third, which is residual in nature. In all three the key is that the bankrupt had been dispossessed by the time the bankruptcy petition had been filed. In that circumstance the rule is that the requisite constructive possession is present if, on the one hand, the claim is merely colorable but not if, on the other, the claim is an adverse claim.

The distinction between claims which are merely colorable and those which are adverse ultimately depends on *Harrison v. Chamberlin*,<sup>78</sup> in which the court stated:

[A]n actual claim may be adverse and substantial even though in fact "fraudulent and voidable." . . . And, on the other hand, a claim is merely colorable if "on its face made in bad faith and without legal justification."

[A]s to the test to be applied in determining whether an adverse claim is substantial or merely colorable, we are of opinion that it is to be deemed of a substantial character when the claimant's contention "discloses a contested matter of right, involving some fair doubt and reasonable room for controversy," . . . in matters either of fact or law; and it is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense.<sup>79</sup>

It follows from *Harrison v. Chamberlin* that a claim is not merely colorable where it is necessary to weigh the force of opposing credible evidence on a substantial and controverted issue of controlling fact.<sup>80</sup> This does not mean, however, that it is necessary to swallow an incredible tale and "be ignorant as judges of what we know as men."<sup>81</sup> In *In re Meiselman*<sup>82</sup> the point was made:

We do interpret these [Supreme Court] decisions as requiring the holding that there is reasonable doubt from the claimant's own testimony alone, when it is disbelieved by the referee. . . . A claimant cannot avoid a summary order by the very audacity of his claims of either fact or law. The referee must proceed to determine whether the adverse claim is "plainly without color or merit and a mere pretense" on a proper weighing of the testimony considered

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<sup>78</sup> 271 U.S. 191 (1926).

<sup>79</sup> *Id.* at 194-95.

<sup>80</sup> *Bostian v. Schapiro*, 144 F.2d 812, 815 (8th Cir. 1944), cited in *Seligson & King*, *supra* note 23.

<sup>81</sup> *Sahn v. Pagano*, 302 F.2d 629, 632 (2d Cir.), cert. denied, 374 U.S. 819 (1962) (quoting Mr. Justice Frankfurter in *Watts v. State of Indiana*, 338 U.S. 49, 52 (1949)).

<sup>82</sup> 105 F.2d 995 (2d Cir. 1939).

in the light of the claimant's self-interest and a due consideration of existing law.<sup>83</sup>

Illustrations of the instances of constructive possession described in *Taubel*, where the bankrupt was dispossessed when the bankruptcy petition was filed, should perhaps be offered. *Mueller v. Nugent*<sup>84</sup> is an agency case. There, before the bankruptcy petition was filed, the bankrupt father had delivered over \$14,000 to the son who was keeping it for him. *Babbitt v. Dutcher*<sup>85</sup> is a no-claim case. There the trustee sought to recover records of the corporate bankrupt from its officers who resisted on the ground that the trustee was not entitled to them because they did not relate "to the property of the bankrupt" but not on the ground that they themselves were entitled to them. *Sampsell v. Imperial Paper Corp.*<sup>86</sup> is a general colorable-versus-adverse-claim case. There the individual bankrupt had formed, controlled, and been in business through the corporation which was claiming to have an adverse interest in assets which once had belonged to the bankrupt. In all of the foregoing cases the claims were found colorable and not adverse.

As often as not, the character of the claim is not clear and as Judge Sanborn said in *Teasdale v. Robinson*,<sup>87</sup> "what may appear to one judge to be a bona fide substantial adverse claim may seem to another to be merely colorable and a pretense."

## B. CONSENT

Where the court does not have possession consent is an alternative basis for summary jurisdiction over controversies between trustees and third persons.

In most courts jurisdiction over subject matter may not be conferred by consent. In contrast, the Act in section 23b expressly provides that bankruptcy courts may acquire subject matter jurisdiction on a consensual basis. Since *MacDonald v. Plymouth County Trust Co.*<sup>88</sup> it has been plain that subject matter jurisdiction so conferred may be summary jurisdiction.

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<sup>83</sup> 105 F.2d at p. 998, cited in Copenhaver, *Summary Jurisdiction*, 41 REF. J. 108 (1967).

<sup>84</sup> 184 U.S. 1 (1902).

<sup>85</sup> 216 U.S. 102 (1910).

<sup>86</sup> 313 U.S. 215 (1941).

<sup>87</sup> 290 F.2d 108, 110 (8th Cir. 1961), cited in Seligson & King, *supra* note 23.

<sup>88</sup> 286 U.S. 263 (1910).

Where predicated on consent, summary jurisdiction ordinarily<sup>89</sup> is in personam and nonexclusive. Once consent is given it may not be withdrawn.<sup>90</sup> The consent may be express, as where the parties have entered into a written stipulation authorizing the bankruptcy court to decide the controversy.

But the consent also may be implied, and a body of case law deals with the issue of when implied consent gives rise to summary jurisdiction. That question usually arises in one or the other of two settings.

In the first, consent to summary jurisdiction over the trustee's claim against the third person is implied if at all from failure of the latter to object to summary jurisdiction before proceeding on the merits. As amended in 1952, the Act in section 2a (7) provides that:

[w]here in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction.

This 1952 amendment to section 2a (7) is the congressional response to *Cline v. Kaplan*.<sup>91</sup> In that case, the trustee had petitioned for an order requiring third persons to surrender specified property, they had answered on the merits and then participated in extensive hearings near the end of which the referee indicated his intention to rule for the trustee. At that point an objection to summary jurisdiction was made for the first time. The Supreme Court did not discuss the effect of the answer on the merits, viewed the hearings as dealing with the question of jurisdiction only, and announced at the end of their opinion that "consent is not given even though claimant 'participated in the proceedings' provided formal objection to summary jurisdiction is made before entry of the final order."<sup>92</sup>

The major consequence of the 1952 amendment to section 2a (7) is to conform the rules for objecting to summary jurisdiction with those for objecting to jurisdiction over the person and for making certain defenses under *Federal Rule of Civil Procedure* 12 (h). Now

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<sup>89</sup> Consent by voluntary surrender of property could give rise to other than *in personam* jurisdiction.

<sup>90</sup> 2 COLLIER ON BANKRUPTCY § 23.08(1), at 534 (14th ed. 1971), and cases cited therein.

<sup>91</sup> 323 U.S. 97 (1944).

<sup>92</sup> *Id.* at 100.

the third person impliedly consents to summary jurisdiction unless he objects by motion before answer or in the answer itself. The bankruptcy court is able to fix a point of no return from implied consent by specifying the time for answering or otherwise responding either by local rules of court or in individual orders to show cause. Although there apparently are not many such local rules the expanding practice is to include in orders to show cause requirements for answers or other responses.<sup>93</sup>

A knotty problem raised by the 1952 amendment to section 2a (7) is whether its swath goes beyond the kind of controversy in *Cline v. Kaplan* which is usually associated with section 2, i.e., where the trustee is attempting to recover specific property, and reaches the kind of controversy usually associated with section 23, where the trustee is attempting to recover on a chose in action. In some districts the practice has developed for trustees to avail themselves of summary jurisdiction to collect accounts receivable. Under this practice the trustee brings a summary proceeding against the obligor, obtains an order requiring that the obligor answer or respond and thereafter show cause why judgment should not be entered against him. If the answer or response does not include an objection to summary jurisdiction, the bankruptcy court hears the matter on the theory of implied consent.

In *re J. S. Mobile Homes*<sup>94</sup> read the 1952 amendment literally to give rise to implied consent where the trustee sought in personam relief on a theory of "tortious conversion" and the respondent did not object to summary jurisdiction until commencement of the hearing. It should be compared with earlier decisions in *In re Houston Seed Co.*,<sup>95</sup> *Inter-State National Bank of Kansas City v. Luther*,<sup>96</sup> *In re Pennington*,<sup>97</sup> and *Continental Casualty Co. v. White*<sup>98</sup> which have all viewed the 1952 amendment as applicable only to situations where the trustee initiates the proceedings and not where the trustee counterclaims to collect on a chose in action after a creditor filed a proof of claim.

It is interesting to speculate what would have been the result in *J. S. Mobile Homes* if there had been a default. In *First National*

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<sup>93</sup> See, e.g., Moller, *Ex Parte Practice and Procedures on Contested Matters*, in PROCEEDINGS OF THIRD SEMINAR FOR REFEREES IN BANKRUPTCY 100 (Clark Boardman ed. 1966).

<sup>94</sup> 434 F.2d 1294 (9th Cir. 1970).

<sup>95</sup> 122 F. Supp. 340 (N.D. Ala. 1954).

<sup>96</sup> 221 F.2d 382 (10th Cir. 1955), cert. dismissed, 350 U.S. 944 (1956).

<sup>97</sup> 339 F.2d 583 (6th Cir. 1965).

<sup>98</sup> 269 F.2d 213 (4th Cir. 1959).

*Bank v. Fox*<sup>99</sup> it was held that a default by an adverse claimant did not amount to consent to summary jurisdiction.

In the second setting, consent to summary jurisdiction over a trustee's counterclaim sometimes is regarded as implied from the filing by a third person of a proof of claim for a pro rata share of the estate, or a petition to reclaim or foreclose upon specific property, or an application for other relief. It is possible that in this setting reliance on implied consent is misplaced.

The pivotal case is *Katchen v. Landy*.<sup>100</sup>

The Act in sections 2a(2) and (15)<sup>101</sup> confers broad powers upon the bankruptcy court to pass on claims and make whatever orders and judgments are necessary to effectuate the purposes of the Act. Further, section 57g<sup>102</sup> provides for the disallowance of claims asserted by creditors who have received but not surrendered "preferences, liens, conveyances, transfers, assignments, or encumbrances, void or voidable under this Act" and section 68<sup>103</sup> sanctions set-offs between the trustee and third persons.

Before *Katchen* most courts agreed that bankruptcy courts had summary jurisdiction over a counterclaim which the trustee asserted defensively or as a set-off to the third person's proof of claim because of their express power to pass on claims and because of the provisions relating to set-offs. If the trustee sought affirmative relief, most courts agreed that summary jurisdiction existed over related counterclaims, variously described as being those based on the subject matter as the claim, or those arising out of the same transaction, or those qualifying as compulsory counterclaims under *Federal Rule of Civil Procedure* 13(a), but that summary jurisdiction did not exist over unrelated counterclaims. The rationale was that the filing of the proof of claim amounted to an implied consent within the purview of section 23 to summary jurisdiction over related counterclaims, but was not such a consent to jurisdiction over unrelated counterclaims. A major consequence of the distinction was that summary jurisdiction did not exist over counterclaims the trustee was likely to make, namely those for the recovery of unrelated preferences or fraudulent conveyances. Different views existed in different

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<sup>99</sup> 111 F.2d 810 (6th Cir. 1940).

<sup>100</sup> 382 U.S. 323 (1966).

<sup>101</sup> 11 U.S.C. § 11a(2), (15) (1970).

<sup>102</sup> *Id.* § 93g.

<sup>103</sup> *Id.* § 108.



jurisdictions, but those summarized in this paragraph were middle-of-the road.<sup>104</sup>

Pre-*Katchen* law tended to narrowly confine summary jurisdiction over the counterclaims asserted by the trustee in response to petitions seeking to reclaim or foreclose upon specific property or other relief as distinguished from those in response to proofs of claim. A leading case was *Daniel v. Guaranty Trust Co.*<sup>105</sup> where a petition to reclaim bonds was met with a counterclaim for the recovery of money, and the Supreme Court held that the bankruptcy court had summary jurisdiction to adjudicate the rights to the bonds but not the rights to the money. The effect of this holding was to deprive the bankruptcy court of summary jurisdiction over unrelated counterclaims even for defensive purposes. Comparable rules were applied in other situations, for example in the case of a counterclaim to an application by the creditor for payment of expense of administration.<sup>106</sup>

In *Katchen* an officer of the corporate bankrupt filed proofs of claim for rent due and for reimbursement of payments he had made on the bankrupt's obligations with his personal funds. The trustee counterclaimed for the recovery of unrelated preferences and an unpaid stock subscription. On review the district court sustained summary jurisdiction over the counterclaim in its entirety. On appeal the court of appeals sustained summary jurisdiction over the part of the counterclaim for the recovery of unrelated preferences but not the part for the recovery of the unpaid stock subscription.<sup>107</sup>

<sup>104</sup> The leading cases are: *Gill v. Phillips*, 337 F.2d 258 (5th Cir. 1964); *Nortex Trading Corp. v. Newfield*, 311 F.2d 163 (2d Cir. 1962); *Peters v. Lines*, 275 F.2d 919 (9th Cir. 1960); *Continental Cas. Co. v. White*, 269 F.2d 213 (4th Cir. 1959); *In re Majestic Radio and Television Corp.*, 227 F.2d 152 (7th Cir. 1955), *cert. denied*, 350 U.S. 995 (1956); *Interstate Nat'l Bank v. Luther*, 221 F.2d 382 (10th Cir. 1955), *cert. dismissed*, 350 U.S. 944 (1956); *In re Solar Mfg. Corp.*, 200 F.2d 327 (3rd Cir. 1952), *cert. denied*, 345 U.S. 940 (1953); *B. F. Avery & Sons Co. v. Davis*, 192 F.2d 255 (5th Cir. 1951), *cert. denied*, 342 U.S. 945 (1952); *Columbia Foundry Co. v. Lochner*, 179 F.2d 630 (4th Cir. 1950); *Floro Realty & Inv. Co. v. Steem Electric Corp.*, 128 F.2d 388 (8th Cir. 1942); *Florance v. Kresge*, 93 F.2d 784 (4th Cir. 1938); *In re Nathan*, 98 F. Supp. 686 (S.D. Cal. 1951). For post-*Katchen* developments see *In re Vista Liner Coach & Trailer, Inc.*, 447 F.2d 497 (10th Cir. 1971); *In re Behring & Behring*, 445 F.2d 1096 (5th Cir. 1971). See also, Rochelle & King, *Summary Jurisdiction in Bankruptcy: Katchen v. Landy and Questions Left Unanswered*, 1966 DUKE L. J. 669; Seligson & King, *supra* note 23.

<sup>105</sup> 285 U.S. 154 (1932).

<sup>106</sup> *Cherno v. Engine Air Service, Inc.*, 330 F.2d 191 (2d Cir. 1964).

<sup>107</sup> 336 F.2d 535 (10th Cir. 1964).

In the Supreme Court the only issue was whether the court of appeals had correctly found summary jurisdiction over the counterclaim for the recovery of the unrelated preferences.<sup>108</sup> The Court answered that question affirmatively but did so without deciding whether the filing of the proofs of claim amounted to an implied consent under section 23b. The Court held that summary jurisdiction existed because in order to pass on the claims the bankruptcy court had to decide the issues underlying the counterclaim. The necessity for doing so followed from section 57g which barred the allowance of the claims in the event the claimant retained preferences. In view of the necessity of the bankruptcy court passing on the preference issue, "it can hardly be doubted that there is also summary jurisdiction" to grant the trustee affirmative relief. Thus, it was crucial that the counterclaim was within the purview of section 57g. The Court stated in a footnote:

[I]t is not necessary to ascertain whether the creditor has "consented" to such determination within the means of § 23(b). Rather, our decision is governed by the "traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure." . . . As this is the basis of our decision, we obviously intimate no opinion concerning whether the referee has summary jurisdiction to adjudicate a demand by the trustee for affirmative relief, all of the substantial factual and legal bases for which have not been disposed of in passing on objections to the claim.<sup>109</sup>

And to amplify on its ruling the Court quoted *Alexander v. Hillman*, an equity receivership case, which lower courts sometimes relied on and sometimes distinguished in determining the scope of summary jurisdiction over counterclaims for affirmative relief. The quote in *Katchen* from *Hillman* is as follows:

"By presenting their claims respondents subjected themselves to all the consequences that attach to an appearance . . . .

"Respondents' contention means that, while invoking the court's jurisdiction to establish their right to participate in the distribution, they may deny its power to require them to account for what they misappropriated. In behalf of creditors and stockholders, the receivers reasonably may insist that, before taking aught, respondents may by the receivership court be required to make restitution. That requirement is in harmony with the rule generally followed by courts of equity that having jurisdiction of the parties to contro-

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<sup>108</sup> Unfortunately, the trustee did not seek to review the adverse decision on the stock subscription.

<sup>109</sup> 382 U.S. at 333 n.9.

versies brought before him, they will decide all matters in dispute and decree complete relief."<sup>110</sup>

Whatever its effect on the rationale of implied consent, *Katchen* probably will not bring about much change in lower court holdings that summary jurisdiction exists to hear non-section 57g related counterclaims to proofs of claim but not non-section 57g unrelated counterclaims. Yet the reliance in *Katchen* on *Hillman* is troublesome, for in *Hillman* the counterclaims were based on torts and were unrelated to the claims which were based on contracts. Also, *Katchen* probably will not change the scope of summary jurisdiction over the trustee's counterclaims asserted against petitions to reclaim or foreclose upon specific property. Here again, the reliance in *Katchen* on *Hillman* is troublesome for *Hillman* seems to make some inroad into *Daniel*.

If implied consent continues to be the basis for summary jurisdiction over counterclaims, some additional points are noteworthy. One already made earlier is that if the proof of claim *proprio vigore* is not implied consent, the failure of the creditor to object when the counterclaim is asserted probably cannot be raised as a different form of implied consent on the theory that the 1952 amendment to section 2a(7) requires such objection.<sup>111</sup> Another is that failure to object before the final order probably would amount to implied consent.<sup>112</sup> The last is that the creditor who files a proof of claim to some extent may be able to avoid a summary jurisdiction over counterclaims by appropriate language in the claim itself.<sup>113</sup> Doubtless, *Katchen* prevents such a reservation from being effective with respect to counterclaims within section 57g, but the language may well be effective with respect to counterclaims outside of section 57g.

It may be noted that implied consent to summary jurisdiction may be found in any other setting where conduct of various kinds amounts to submission of an issue or matter to the court's determination. An example of such conduct is a voluntary surrender of property to the bankruptcy court.<sup>114</sup>

### C. SUPPLEMENTAL GRANTS

There are three supplemental grants of summary jurisdiction

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<sup>110</sup> 382 U.S. at 335.

<sup>111</sup> See notes 95-98 *supra*.

<sup>112</sup> *In re Read-York, Inc.*, 152 F.2d 313 (7th Cir. 1945).

<sup>113</sup> *In re Eakin*, 154 F.2d 717 (2d Cir. 1946); *Glen Falls Ins. Co. v. Strom*, 198 F. Supp. 450 (S.D. Cal. 1961); *In re G. L. Odell Const. Co.*, 119 F. Supp. 578 (D. Colo. 1954).

<sup>114</sup> 2 COLLIER ON BANKRUPTCY § 23.08(2) (14th ed. 1971).

in the Act worthy of mention in the text of this article; the others are cited in the footnote.<sup>115</sup>

Section 67a (4)<sup>116</sup> specifically grants summary jurisdiction where the trustee seeks to set aside liens obtained through judicial proceedings within four months before bankruptcy when the bankrupt was insolvent. Section 70a (8)<sup>117</sup> expressly grants summary jurisdiction when the trustee brings an action to compel an assignee for the benefit of creditors to turn over property to the bankruptcy estate. Section 60d<sup>118</sup> has been held to impliedly grant summary jurisdiction over payments and promises to pay to attorneys in contemplation of bankruptcy.

#### D. JURISDICTIONAL HEARING

The bankruptcy court determines whether it has summary jurisdiction or not. To that end, where the issue is raised the bankruptcy court must hold a preliminary hearing to determine whether some basis for summary jurisdiction exists.

Most often the preliminary hearing is crucial where constructive possession is the only possible basis of summary jurisdiction and its existence depends upon whether the claim of a third person in actual possession is colorable or adverse. It is well settled that the bankruptcy court in that situation makes the determination and does not cease to function merely because the claimant asserts an adverse claim. As the Court said in *Harrison v. Chamberlin*:

[T]he court is not ousted of its jurisdiction by the mere assertion of an adverse claim; but, having the power in the first instance to determine whether it has jurisdiction to proceed, the court may enter upon a preliminary inquiry to determine whether the adverse claim is real and substantial or merely colorable. And if found to be merely colorable the court may then proceed to adjudicate the merits summarily; but if found to be real and substantial it must decline to determine the merits and dismiss the summary proceeding.<sup>119</sup>

#### IV. PERSONAL JURISDICTION

A source of continuing puzzlement is the reach of the bankruptcy court's original process in the exercise of its summary jurisdiction. Congress could make the bankruptcy court's service of

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<sup>115</sup> 11 U.S.C. §§ 11a(21), 69b, 78n, 931, 107f(4), and 109b (1970).

<sup>116</sup> *Id.* § 107a(4).

<sup>117</sup> *Id.* § 110a(8).

<sup>118</sup> *Id.* § 96d.

<sup>119</sup> 271 U.S. at 194.

process nationwide,<sup>120</sup> but for the most part it has declined to do so in straight bankruptcy. It follows that the reach of the bankruptcy court's original process may not correspond with the reach of its subject matter jurisdiction.

There is little question but that the bankruptcy court's original process is at least co-extensive with that of district courts as ordinary federal courts. This is because General Order 37 makes applicable *Federal Rule of Civil Procedure* 4(f), which permits service of original process "anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state." However, the reach of the bankruptcy court's subpoena power is more confined than that for ordinary federal courts under *Federal Rule of Civil Procedure* 45(e).<sup>121</sup>

The uncertain question is when if ever the reach of the bankruptcy court's original process is ever more extensive than the federal rules indicate. On rare occasions the courts have implied a greater reach of process to correspond with subject matter jurisdiction. Thus, the bankruptcy court can issue an injunction into another state to protect property within its exclusive jurisdiction which is located there.<sup>122</sup> And in the Eighth Circuit the bankruptcy court which has property in its possession which is located in another state may determine rights to that property by way of process served on out-of-state claimants.<sup>123</sup> On the other hand, it has been held that in a turnover proceeding the process must be served within the territorial limits of the particular bankruptcy court.<sup>124</sup>

The Proposed Bankruptcy Rules will dispel much of the uncertainty, authorizing nationwide service of process from the bankruptcy court.<sup>125</sup>

<sup>120</sup> *Continental Bank v. Rock Island Ry.*, 294 U.S. 648 (1935); 1 COLLIER ON BANKRUPTCY § 2.11(1) (14th ed. 1971).

<sup>121</sup> This is because the Bankruptcy Act § 41a(4), 11 U.S.C. § 69a(4), permits the subpoena of witnesses before the referee from no greater a distance than 100 miles. See 1 COLLIER ON BANKRUPTCY § 2.11(2.1) (14th ed. 1971).

<sup>122</sup> *Ex parte Baldwin*, 291 U.S. 610 (1934); cf., *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. 300 (1911).

<sup>123</sup> *In re Graniter City Bank of Dell Rapids*, 137 F. 818 (8th Cir. 1905); see also, *In re Pure Rock Asphalt Co.*, 28 F. Supp. 685 (W.D. Ky. 1939).

<sup>124</sup> *Noll v. Hodgson*, 70 F.2d 19 (4th Cir. 1934).

<sup>125</sup> Rule 704(f) (1). Some process can be served worldwide. Rule 704(f) (2).

## V. RELIEF AVAILABLE: FORM OF ORDER

Questions sometimes are raised as to the kind of relief the bankruptcy court is empowered to grant and the form of the order it is empowered to make. Invariably, these questions have to do with when the trustee is the prevailing party. Most likely under section 2a(15) the bankruptcy court can grant whatever relief is necessary since that provision says as much. The order entered could be a turnover order, a decree cancelling transfers, liens, or the like, a decree for the payment of money from specified funds or from general funds, or a money judgment.<sup>126</sup>

The turnover order is the stock in trade of the bankruptcy court and is deserving of further explanation. A turnover order is an order of restitution seeking to get at the property or its identifiable proceeds rather than at the third person. Even though summary jurisdiction has been established, the trustee is not entitled to a turnover order unless he has proved by clear and convincing evidence that the property has been extracted from the estate and that the third person has actual possession and can comply with the turnover order. In *Maggio v. Zeitz*<sup>127</sup> the Supreme Court emphasized that a turnover order is inappropriate except where the third person can comply with it. This is so because the turnover order commonly is enforced through civil contempt proceedings which can result in incarceration, and in those contempt proceedings a turnover order is res judicata on the question of possession as of its date.

In proving the requisite possession the trustee may benefit from a presumption of continued possession. It is noteworthy that the turnover may be ordered on the strength of that presumption even though contradicted by testimony where that testimony is not credible.<sup>128</sup>

It should also be noted that a turnover order may be the basis of a nonbankruptcy court money judgment and in that suit would have res judicata effect.<sup>129</sup>

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<sup>126</sup> See, e.g., *Maggio v. Zeitz*, 333 U.S. 56 (1947); *May v. Henderson*, 268 U.S. 111 (1925); *In re J. S. Mobile Homes*, 434 F.2d 1294 (9th Cir. 1970); *South Falls Corp. v. Rochelle*, 329 F.2d 611 (5th cir. 1964); *Governor Clinton Co. v. Knott*, 120 F.2d 149 (2d Cir.), *appeal dismissed*, 314 U.S. 701 (1941).

<sup>127</sup> 333 U.S. 56 (1947).

<sup>128</sup> *Sahn v. Pagano*, 302 F.2d 629 (2d Cir.), *cert. denied*, 371 U.S. 819 (1962).

<sup>129</sup> *Kane v. Smith*, 56 Wash. 2d 799, 355 P.2d 827 (1960); *Sampsell v. Gittelman*, 55 Cal. App. 2d 208, 130 P.2d 486 (1942).

## VI. FINAL REMARKS

The preceeding discussion identifies and simplifies the most significant features of summary jurisdiction in straight bankruptcy. The Proposed Bankruptcy Rules will clarify and resolve many of the problems, however, difficulties will remain.